

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR BENEFICIAL WATER USE PERMIT NO.    )  
17076-s41F BY THOMAS E. FAIRHURST       )  
AND GEORGE DOUGLAS FAIRHURST            )       FINAL ORDER

\* \* \* \* \*

There being no exception of objection to the Proposal for Decision entered in this matter, the same is hereby made final and is expressly incorporated herein.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Final Order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 17076-s41F is hereby granted to Thomas E. Fairhurst and George Douglas Fairhurst to appropriate 2,000 gallons a minute up to 345 acre-feet per year for new sprinkler irrigation of 115 acres more or less, comprised of 34 acres in the NE1/4 and 81 acres in the NW1/4 of Section 6, Township 1 North, Range 2 East. The source of supply shall be tail or waste waters from an existing diversion, which waters will be diverted at a point in the approximate center of the NW1/4 of the SW1/4 of Section 6, Township 1 North, Range 2 East, all in Gallatin County. The

priority date for this permit shall be January 23 of 1978 at 11:38 a.m..

This permit is subject to the following express conditions, restrictions, and limitations.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittees to withdraw water to the detriment of any senior appropriator.

B. The Permittees shall not withdraw or cause to be withdrawn more water than is reasonably required for the purposes provided for herein. When waters are not required for such purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused, even if such damages are the necessary and unavoidable consequence of the exercise of this permit.

D. The Permittees shall proceed with reasonable diligence in the completion of their appropriation by actually applying the waters provided for herein to beneficial use.

E. The Permittees shall in no event exercise any right, and by the terms herein none are given, to any waters of the Madison

River save excess or waste waters by the existing ditch.  
diversion.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 20<sup>th</sup> day of April, 1982.

Gary Fritz

Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 449 - 2872

Matt Williams

Matt Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION            )  
FOR BENEFICIAL WATER USE PERMIT            )     PROPOSAL FOR DECISION  
NO. 17076-S41F BY THOMAS E. FAIRHURST)  
AND GEORGE DOUGLAS FAIRHURST                )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Bozeman, Montana.

STATEMENT OF THE CASE

The present application seeks 2,000 gallons a minute up to 345 acre-feet per year for new irrigation from May 1 through September 30, inclusive, of each year of 115 acres more or less, comprised of 34 acres in the NE1/4 and 81 acres in the NW1/4 of Section 6, Township 1 North, Range 2 East, all in Gallatin County. The source of supply is claimed to be tail waters from an existing ditch diversion, the waters therefrom to be diverted at a point in the approximate center of the NW1/4 of the SW1/4 of Township 1 North, Range 2 East, all in Gallatin County. The Applicants appeared by Tom Fairhurst and through Counsel John Scully.

On October 9, 1978, an objection to the above-stated application was filed with the Department by the Montana Power Company. This objection claims generally that there is insufficient unappropriated water available for the Applicants' proposed use without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators. The Montana Power Company appeared through Larry Gruel and was represented by Counsel Jock Anderson of Gough, Shanahan, Johnson and Waterman.

On October 13 of 1978, an objection to the granting of the instant application was filed with the Department on behalf of the Bureau of Reclamation of the United States of America. This objections alleges generally that there are not sufficient unappropriated waters available for the Applicants' proposed use and that such use will adversely affect the prior rights of the Bureau of Reclamation's Canyon Ferry and Helena Valley units. The Bureau of Reclamation appeared at the hearing by Wayne Treers and through Counsel Richard Aldrich.

On October 31 of 1978, an objection to the instant application was filed with the Department by the Madison River Cattle Company. It's objection claims inferentially of the proposed use by the Applicants of this Objector's appropriative works. This Objector did not appear at the hearing in this matter as an Objector.

The Department of Natural Resources appeared at the hearing through T.J.Reynolds, Area Office Field Supervisor for the Department's Helena Field Office.

## FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and by the appearance of the parties hereto has jurisdiction over the persons involved herein.

2. The instant application was duly and regularly filed with the Department of Natural Resources and Conservation on January 23 of 1978.

3. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource.

4. The Applicants intend to cultivate alfalfa hay throughout the growing season.

5. The Applicants intend to irrigate as required from May 1 to September 30, inclusive, of each year. This time period reflects the period during which waters can be put to the use proposed by the Applicants.

6. The Applicants intend to irrigate 115 acres more or less comprised of 34 acres in the NE1/4 and 81 acres in the NW1/4 of Section 6, Township 1 North, Range 2 East, all in Gallatin County.

7. The source of supply for Applicants' water will be tail waters or waste waters from an existing ditch diversion. The Applicants will divert such waters at a point in the approximate center of the NW1/4 of the SW1/4 of Section 6, Township 1 North, Range 2 East, all in Gallatin County.

8. The Applicants will convey the waters to the proposed place of use by means of an open ditch; thence the waters will be applied for irrigation by means of sprinkler systems.

9. The Applicants' proposed means of diversion are customary for their intended purposes, and said means will not result in the waste of the water resource.

10. The Applicants do not intend to divert any waters from the Madison River in their own right, but instead will merely rely on any waters accruing from an existing ditch diversion.

11. The Applicants intend to divert up to 2,000 gallons a minute up to 345 acre-feet per year for their proposed irrigation. In light of the type of soil in the area, the prevailing climate, the type and method of applying the water, and the conveyance losses to be expected by the open ditch, such amount of water is a reasonable estimate of the quantity of water required for Applicants' purposes, and said quantity will not result in the waste of the water resource.

12. The use of the waters claimed herein will be of material benefit to the Applicants. The lands described herein are not capable of producing alfalfa hay without the use of the waters claimed herein. Moreover, the use of the waters described herein will cure substantial erosion problems caused by the unrestricted flow of waste waters from the existing ditch diversion across Applicants' lands.

13. There are no permits or water reservations which the Applicants' proposed uses will affect.

14. There are unappropriated waters available for Applicants' use in the amounts they seek to appropriate and throughout the time during which they seek the use of the water.

15. The waters accruing from the existing ditch structure have historically run down and augmented certain ponds. These ponds have no surface water tributary connection to the Missouri River. Said ponds are at least one-half mile from any tributary surface flow to the Missouri River.

16. The Applicants' proposed use will not adversely affect the rights of any prior appropriator.

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and by the appearance by the parties, has jurisdiction over the persons herein. See MCA 85-2-301 (1981) et. seq.

2. The Department is mandated to issue a new water use permit if the following conditions or criteria exist:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the application seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;



(6) an applicant for an appropriation of 10,000 acre-feet a year or more or 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.

3. The Applicants have a bona fide intent to appropriate water pursuant to a fixed and definite plan, and they are not attempting to speculate in the water resource. See generally, Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

4. The use of the waters claimed herein will be of material benefit to the Applicants, and thus such a use belongs to the class of uses that can be regarded as beneficial. See MCA 85-2-102 (2) (1981).

5. Two thousand gallons a minute up to 345 acre-feet per year is a reasonable estimate of the quantity of water required for Applicants' purposes, and the use of said quantity will not result in the waste of the water resource. See generally, Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), Wordon v. Alexander, 108 Mont. 208, 90 P. 2nd 160 (1939).

6. The Applicants' proposed means of diversion are adequate for their intended purposes, and said means will not result in the waste of the water resource. See generally, State ex. rel. Crowley v. District Court, 108 Mont. 89, 88 P. 2nd 23 (1939).

7. There are unappropriated waters available for the Applicants' use in the amounts that they seek to appropriate and throughout the period during which they seek the use of the water. Applicants intend to rely entirely upon excess waste waters accruing from an existing ditch diversion. They do not claim any independent right to the waters that flow in the

Madison River from which these waters are ultimately derived. These tail or waste waters are likely to flow throughout the period during which the Applicants seek to use the water, as they are devoted to an agricultural use which use can reasonably be expected to be exercised within the same time parameters as Applicants' proposed use.

It is clear that such excess or tail waters may form source of supply susceptible to an appropriation. See MCA 85-2-102 (14) (1981), Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930). However, since the Applicants herein do not seek appropriation of water independent of the use by which these waste waters are derived, they inevitably take subject to the abandonment of the right that sponsors the returns, and of course they obtain no vested right in any waste of the water resource on the part of the upstream appropriator. Moreover, Applicants are in some measure subject to the rights of the upstream appropriator to make reasonable use of his lands. See Newton v. Weiler, supra.

The waters claimed herein are surplus on this record to the needs of any senior appropriator. Accepting the truth of the allegations contained in Montana Power Company's and the Bureau of Reclamation's objections in this matter, and viewing the evidence presented herein most favorable to these entities, it cannot be said under the circumstances disclosed herein that the waters the Applicants seek to use are in any way required for the downstream uses of these entities. Historically, the waters the Applicants seek to divert have augmented pools of water collecting in a depressed area with no surface connection to any

water course or drainway that is tributary to the Missouri River. Thus, if these waters have been used at all by downstream users on the Missouri River, it has been as a result of the percolation such waters through the geologic underlay.

The Hearings Examiner can officially note that the valley in and about the proposed place of use is relatively level. Such being the case, it is not at all likely that any groundwater gradient running to any surface stream will show any marked inclination. Moreover, in view of the distances of the ponds from the stream, it is reasonable to assume that the geologic materials about this area will have something less than the highest transmissivity characteristics associated with gravel-based alluvial structures.

Under the circumstances, therefore, it is most unreasonable to assume that any waters historically percolating through the underlay from the ponds will move at any degree of dispatch toward any surface stream. The Hearings Examiner, therefore, will not assume such waters would have historically reached the diversion point of downstream appropriators at their historic time and place of need. The magnitude of time required for these waters to move the distances described in the record might easily be described in terms of years. There is every reason to believe that natural precipitation will compensate for any deprivation to the groundwater resource caused by the Applicants' use of the waters they claim herein. An Applicant is not required to conduct an exhaustive hydrological and geological survey of the upper Missouri Basin in order to discharge his burden of proof

for a new water use permit.

8. The Applicants' proposed use will not adversely affect the rights of a prior appropriator. Insofar as the Objectors Bureau of Reclamation and Montana Power Company are concerned, the Applicants will divert waters that are not tributary to their source of supply. That is, the waters captured and used by the Applicants would not otherwise have arrived at the histories time and place of need of these Objectors.

Although Madison River Cattle Company do not appear to press their objections, it is apparent that Applicants' proposed use will not adversely affect its right to use water. Being downstream from its point of diversion and place of use, the Applicant is simply not situated so as to interfere with this Objector's historic water use. Nor under the circumstances disclosed by the record is there a realistic chance that the Applicants' proposed use will cause this Objector's water use to be called out by a senior appropriator in times of shortage.

9. The priority date for the permit to be issued in this matter shall be January 23, 1978, at 11:38 a.m..

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following proposed order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 17076-s41F is hereby granted to Thomas E. Fairhurst and George Douglas Fairhurst to appropriate 2,000 gallons a minute up to 345 acre-feet per year for new sprinkler irrigation of 115 acres more

or less, comprised of 34 acres in the NE1/4 and 81 acres in the NW1/4 of Section 6, Township 1 North, Range 2 East. The source of supply shall be tail or waste waters from an existing diversion, which waters will be diverted at a point in the approximate center of the NW1/4 of the SW1/4 of Section 6, Township 1 North, Range 2 East, all in Gallatin County. The priority date for this permit shall be January 23 of 1978 at 11:38 a.m..

This permit is subject to the following express conditions, restrictions, and limitations.

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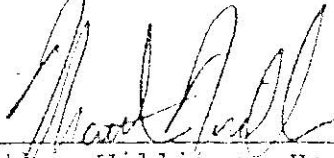
B. The Permittees shall not withdraw or cause to be withdrawn more water than is reasonably required for the purposes provided for herein. When waters are not required for such purposes, the Permittees shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or reduce the Permittees' liability for damages which may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for damages caused, even if such damages are the necessary and unavoidable consequence of the exercise of this permit.

D. The Permittees shall proceed with reasonable diligence in the completion of their appropriation by actually applying the waters provided for herein to beneficial use.

E. The Permittees shall in no event exercise any right, and by the terms herein none are given, to any waters of the Madison River's save excess or waste waters by the existing ditch diversion.

DONE this 4<sup>th</sup> day of April, 1982.

  
Matthew Williams, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

NOTICE

This Proposal for Decision is offered for the review of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before April 26th, 1982.

CASE # 17076